No. 14690-C.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE QUAKER OATS COMPANY, a corporation,

Appellant,

vs.

W. E. McKIBBEN, A. B. CARTER, O. R. LEWIS and CHARLEY GEERS,

Appellees.

REPLY BRIEF OF APPELLEES W. E. McKIBBEN, A. B. CARTER, AND O. R. LEWIS.

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Frank C. Nimocks of 11017 S. New Street, Downey, California, and Harry B. Ellison, of 11022 S. La Reina Avenue, Downey, California, appearing for Appellees W. E. McKibben, and A. B. Carter doing business as Downey Rabbit and Poultry Co., hereinafter referred to as Downey Co., and O. R. Lewis individually, Appellees.

The Pleadings.

The complaint on file is predicated on conversion of certain turkeys by the Appellees, and Appellee Charley Geers and prays judgment in the sum of $10,400.00, together with costs, etc. The complaint does not make certain growers who were under contract with the Quaker Oats Co. a party or parties to the action.

The answer of Lewis and the Downey Co. denies conversion and sets up as a defense that the turkeys were purchased by it in the usual course of business and without actual knowledge of the existence of a chattel mortgage upon said turkeys between or among the Quaker Oats Co., and the said growers.

The Issues Involved.

The issues involved in this action are:

1. Did the Downey Co. and Lewis knowingly convert the turkeys to their use?

2. Did the Downey Co. and Lewis purchase the turkeys from the defendants John J. Couch and Charley Geers in the ordinary course of trade?

3. Was there a waiver and extinguishment of the mortgage lien?

Brief Résumé of the Evidence.

The facts and the law upon which the court rendered judgment is clearly set forth in the Court's Memorandum of Opinion [Clk. Tr. 21] as follows:

Memorandum of Opinion [Tr. p. 21.]

"In the above action plaintiff filed a complaint, alleging defendants wrongfully converted to their own use 1500 live turkeys each of which was the subject of a chattel mortgage and upon which the plaintiff had a lien.

Harry McVickers and Carl W. Ohlson are turkey growers near Hemet, Riverside County, California. Plaintiff is in the business of providing poults for turkey growers and furnishing feed for the turkeys until maturity. As a protection for the money advanced for poults and

feed to be furnished, chattel mortgages are executed covering the turkeys. In this particular case poults were furnished to McVickers and Ohlson and, subsequently, feed was furnished by plaintiff. (21) A chattel mortgage was obtained from each of the turkey growers, which was duly acknowledged and recorded in Riverside County, California. At the time of the execution of the chattel mortgage, an additional contract was entered into between the parties by which McVickers and Ohlson agreed not to sell any of the turkeys without first having obtained the plaintiff's written consent. It does not appear that this contract was ever recorded. In due course of time the poults grew to maturity and were ready for sale.

Defendants John J. Couch and Charley Geers were hucksters. They were in the business of buying turkeys from growers, transporting the turkeys to the market in Los Angeles, California, and selling them to processors. The processors, in turn, would slaughter the turkeys and sell either to wholesalers or retailers for ultimate consumption by the general public.

Defendant Couch appeared at the ranches of Harry McVickers and Carl W. Ohlson and purchased the turkeys involved in this proceeding. Most of the purchases were made by the defendant Couch. The turkeys were paid for by checks, made payable to the growers and to the Quaker Oats Company. The turkeys were transported from Riverside County to Los Angeles where they were sold to the defendant processors. All of the checks given in payment for the turkeys involved herein were turned down by the bank, for the reason that there were not sufficient funds in the account to pay the checks when presented. However, checks given for the first purchase

of turkeys from grower McVickers were subsequently deposited and actually cleared. None of the other checks were ever paid.

Evidence in the case disclosed that the business (22) of collecting from the processors and the deposit of the money in the bank was delegated to Geers; defendant Couch's main duty being to contact the farmers, buy the turkeys and transport them to Los Angeles where they were turned over to Geers for sale. Evidence introduced at the trial indicated that at the time the defendant Couch gave checks for the purchase of these turkeys there was sufficient money in bank to cover the checks; but by the time the checks were presented to the bank for payment the account had been depleted to such extent that the checks were turned down by the bank.

Plaintiff contends that it had a valid chattel mortgage on the turkeys herein; that the chattel mortgage was good at the time of sale, and inasmuch as it was never paid for the turkeys plaintiff could maintain this action against the defendant Couch and the processors upon the theory that the turkeys had been unlawfully converted. Prior to the commencement of this action *Geers* was killed in an automobile accident and in consequence was not named as a party defendant.

All parties concede the chattel mortgages were valid. Defendants contend, however, that plaintiff lost its lien upon the turkeys at the time of sale, because the turkeys were sold with the consent of the plaintiff mortgage holder.

Evidence in the case discloses it was the custom of plaintiff to allow its growers to sell their turkeys, the only requirement insisted upon by plaintiff being that if checks were given in the sales, they would be made payable to the

grower and to the Quaker Oaks Company jointly. Otherwise, the company did not seem to have any control over sale of the turkeys.

However, plaintiff contends the contracts executed (23) between it and the growers provide the turkeys could not be sold without written consent to the sale having first been obtained from the mortgage holder. There is no dispute that such a contract was entered into; but the evidence conclusively shows the provision of the contract relative to obtaining written consent from the mortgage holder before turkeys were sold was waived by the conduct of the Quaker Oats Company. Although plaintiff is engaged in selling feed to numerous turkey growers, in no instance was there any evidence that plaintiff ever complained because of any grower's sale of turkeys without first having obtained the written consent to plaintiff.

Grower Ohlson testified that some time prior to sale of the first lot of turkeys to Couch he had sold a small lot of turkeys (75 or 80 birds) to a small operator; that he did not have written consent from the Quaker Oats Company to sell the birds; that the check in payment was made to himself and the Quaker Oats Company; that he sent the check to the Quaker Oats Company, which was accepted, and that the plaintiff herein at no time protested that the birds could not be sold without its written consent. He testified he had been dealing with plaintiff for two years and had always sold the turkeys he raised without any written authorization of sale from plaintiff. He sold his turkeys to purchasers who solicited the sales, and the checks made payable to him and the Quaker Oats Company were sent to the Quaker Oats Company. At no time did the Quaker Oats Company

complain that turkey sales were made without obtaining its written consent, nor did the plaintiff at any time protest such procedure.

In the case at bar the first lot of turkeys was purchased from grower McVickers. Checks were obtained by (24) McVickers from the defendant Couch, in payment of the first lot of turkeys, which checks were made payable to McVickers and the Quaker Oats Company. The checks were thereupon sent by McVickers to the Quaker Oats Company, and the Quaker Oats Company did not protest in any way, nor did it even suggest to McVickers that he did not have a right to sell the turkeys without first obtaining its written consent. Instead, the checks were acceputed by the Quaker Oats Company and deposited in the regular course of business. They were returned by the bank and subsequently were redeposited by the Quaker Oats Company and were finally honored and paid.

McVickers testified he had been raising turkeys for seven years and had been dealing with the Quaker Oats Company since prior to 1952; that he had always sold the turkeys he raised and had never had any written authorization from the Quaker Oats Company covering such turkey sales. Although some time elapsed between receipt by the Quaker Oats Company of the first checks from McVickers and subsequent sales by McVickers and Ohlson, the plaintiff did not in any way impress upon growers McVickers and Ohlson that they could not sell the turkeys until plaintiff's written consent had been first obtained.

One of the defendant processors testified he had been in the turkey business for thirty-two years; that he had purchased turkeys from farmers at numerous times; that

he had never seen any written authorization from mortgage holders relative to sale of turkeys. He said that he just bought the turkeys from the farmers and made his checks payable to the farmers and the feed men; that he had never contacted a feed man; that he had purchased turkeys which were fed by the Quaker Oats Company, and that at no time did the (25) Quaker Oats Company indicate to him that the farmer could sell turkeys only upon its written authorization.

Plaintiff further contends growers had no authority to sell turkeys except for cash and that acceptance of a check, later dishonored by the bank, was not cash, and consequently there was no sale. However, the evidence conclusively shows it was the custom in the turkey industry to pay farmers by check and not by cash, and that the checks were made payable to the farmers and the feed company. At no time did the Quaker Oats Company suggest to anyone in any manner that checks were not acceptable. In fact, checks were accepted and treated as cash; and in the case at bar the checks which cleared were made payable to the grower and plaintiff and were accepted by the plaintiff, and plaintiff did not in any way indicate to the grower that such checks in payment would not be acceptable. Plaintiff also contends the mortgage which it had on the turkeys was a valid lien until paid and that there was no payment until the checks cleared.

It is defendants' contention, however, that although there was a valid mortgage, nevertheless, the mortgage lien was extinguished when plaintiff allowed the mortgagor who had possession of the turkeys to sell them; and, consequently, defendants obtained the turkeys free and clear of the mortgage lien in question.

This is no new problem in California, for from the earliest times the courts have been called upon to adjudicate disputes arising over the sale of mortgaged crops and chattels. In 1896, the Supreme Court of California, in *Maier v. Freeman,* 112 Cal. 8, was called upon to determine the rights of a purchaser of mortgaged sheep which, while in (26) possession of the mortgagor, were sold. In that case the court points out that it was part of the agreement between the parties to the mortgage that the mortgagor should sell the sheep but should deposit the net proceeds of the sale to the credit of the mortgagee. The Court quotes from *White Mountain Bank v. West,* 46 Me. 15 (Page 12 of the California citation) as follows:

> ' "from the time of sale the lien of the mortgage was extinguished, and the mortgagee was left with no security but the personal promise of the mortgagor to pay the proceeds to him." '

The Supreme Court of California then went onto say:

> 'There are many decision that the mortgagee of chattels may authorize the mortgagor to sell the encumbered property and apply the proceeds of sale upon the debt secured, and that such an agreement does not render the mortgage fraudulent in law, nor affect the lien thereof *prior to the sale* (citing cases); but we have found no case in which the lien was held to attach to the proceeds unpaid by the purchaser.' (Emphasis supplied.)

In *Ramsey v. California Packing Corporation,* 51 Cal. App. 517, which dealt with the sale of mortgaged crops, the Court said (p. 522):

> '* * * Obviously, if the crops were removed by and with the consent of the plaintiff, then they

were not wrongfully or tortiously removed, and in that case the lien of the mortgage ceased upon such removal by operation of law.' (27)

In that case (the facts of which are somewhat similar to those in the case at bar) the mortgage holder knew that certain portions of the crop had been removed from the premises and sold yet did not take any steps to prevent further removal and sale. The Court continues, at page 528:

'* * *; for, at the time of the purchase of the tomatoes by the Packing Corporation and the corn by Powers, the lien of the mortgage had *prima facie* been extinguished by the removal of those crops from the land on which they were grown (citing cases), and it rested upon the mortgagee, if he would still enjoy the benefit of his mortgage security, to rebut that presumption by showing that the crops were removed without his knowledge and consent and that it was, therefore, a tortious removal. And, as before declared, even if it had been shown that the mortgagors had wrongfully removed the crops and sold the same to a third party, it would still be necessary, to bind the latter in an action for damages for such wrongful removal or for the conversion of the crops, further to show that such removal was tortiously effected with his knowledge or by connivance on his part with those wrongfully removing the crop to effect such removal. * * * This agreement (allowing the mortgagors to sell the mortgaged crops and turn over the proceeds of sale to plaintiff and Emerson) amounted in practical effect to a substitution of the personal obligation of the mortgagors for the security of the mortgage.' (28)

In the *Valley Bank v. Hillside Packing Company,* 91 Cal. App. 738, the bank, after loaning money and taking a chattel mortgage upon an orange crop, authorized delivery of the crop to any packing house selected by the mortgagor. At page 741 the Court said:

> '* * * The mortgagor's removal without consent of the mortgagee would be tortious. Consent that he may do so would extinguish the mortgage lien.'

H. B. Reno v. A. L. Boyden Company, 115 Cal. App. 697, concerned a chattel mortgage, which had been given on an apiary, honey and other personal property. A portion of the honey stored was sold after recordation of the chattel mortgage. In that case the Court found the plaintiff had given the defendant authority to sell the honey, although the plaintiff testified:

> 'I told him the last time he positively couldn't sell that honey unless he paid me $500.00 and all interest to date.'

The Court said at page 700 that the evidence

> 'clearly shows that he gave defendant Fassel permission to sell the honey on the latter's promise to pay him out of the proceeds $500 and the interest due, * * * Fassel having sold with plaintiff's consent, there could be no conversion, either in the sale by him or in the purchase by his co-defendant, * * *'.

The Court thereupon ruled (p. 702) that where:

> 'the property is sold with the consent of the mortgagee, * * * the latter waives his lien and the buyer is protected by the absolute sale.' (29)

In one of the latest cases decided by the California courts, *I. S. Chapman & Co. v. Ulery,* 15 Cal. App. 2d

452, the Court, after reviewing prior decisions of the California courts relative to the effect of selling mortgaged property with consent of the mortgagee, reiterates the rule that where mortgaged property is sold with consent of the mortgagee, the mortgagee thereupon loses his lien.

In the case at bar the evidence discloses that plaintiff allowed growers to sell turkeys to anyone who would purchase them. When plaintiff permitted the growers to sell mortgaged property, the mortgagee thereupon lost its lien, and removal of the turkeys in question from the ranch of the growers was not tortious.

As a consequence, judgment will be rendered in favor of the defendants herein. Counsel for defendants will prepare findings of fact, conclusions of law and judgment in conformity with the opinion expressed herein for presentation for signature on or before the 15th day of May, 1954. Dated May 5, 1954. Harry C. Westover, District Judge."

(Obviously, the name "Geers" on page 23 should have been "Couch." (This matter is mentioned as "technical points" on p. 8 of App. Op. Br.))

Comment.

As before stated this action is based upon conversion. Conversion means the unlawful taking of one's goods or chattels. Unlawful taking incorporates a tortious act. In the case at bar, in order to support appellant's theory, this Court must hold that the sale to appellees McKibben *et al.,* was unlawful, tortious, and accomplished by unlawful and tortious acts of Appellees McKibben, Carter and Lewis.

The evidence relied upon to establish conversion falls far short of any unlawful or tortious act. The conduct of the appellant permitted the transfer of the property by the growers to the hucksters, with the knowledge that the hucksters would sell the turkeys to the processors, the only limitation being that checks from the hucksters were to be made payable to the grower and the Quaker Oats Company. Such procedure was minutely followed and is definitely established by the evidence.

The Evidence.

Mr. Geers testified in part as follows:

"The Court: I notice these checks are made out, at least some of them are made out jointly to not only the seller, but the Quaker Oats Co. Did you know when you made out these checks that the Quaker Oats Co. claimed a lien on the turkeys?

The Witness: Yes, sir. That is how come us to get a lead on where to buy them. The Quaker Oats representative approached us at the scales in Perris, a fellow by the name of Bill Brooks, and asked us to buy these turkeys."

The Court: In all these transactions, did you pay for any of the poultry or the turkeys in any way except by check?

The Witness: No, sir.

The Court: Never paid cash?

The Witness: No, sir.

The Court: Always gave checks?

The Witness: Yes, sir." [Tr. 75.]

"The Court: How did you know there was a lien on the poultry?

The Witness: Most of the growers would tell you.

The Court: Did they tell you to make the check to themselves and the feed company?

The Witness: Yes, sir." [Tr. 75, 76.]

William B. Brooks a representative of the appellant, testified in part as follows:

"Q. During the month of August 1952, by whom were you employed? A. In August 1952 I was employed by the Quaker Oats [Tr. 111-114] Company.

Q. What was your capacity there? A. I was district representative for Riverside County.

Q. Did you have under your jurisdiction the area or Perris? A. Yes, I did.

Q. Are you acquainted with Mr. McVicker and Mr. Ohlson, growers up there? A. Yes, I am." [Tr. 145.]

"The Court: You said a little while ago the growers were authorized to sell their turkeys to certain individuals.

The Witness: Yes.

The Court: Did you give that authorization to growers in writing?

The Witness: No.

The Court: Just orally?

The Witness: That's right." [Tr. 152.]

Cross-Examination by Mr. Geers:

"A. The check No. 1, Exhibit 1, was made out to C. W. Ohlson, and Exhibit No. 2 is made out to C. W. Ohlson and the [Tr. 134] Quaker Oats Company.

Q. Did you question that? A. Yes, I did. Mr. Ohlson told me that he had requested Mr. Geers to make out a check to him personally in the sum of $600, and that he intended to request permission

from me or from the credit department of Quaker Oats Company to keep that $600. *The requirements in our contract with the growers call for checks to be made out jointly to the grower and the Quaker Oats Company.*" [Tr. 162.]

Testimony of W. E. McKibben in part:

"A. I purchased some poultry products from John Couch and Charles Geers.

Q. Was that in the regular course of business? A. Yes." [Tr. 166.]

"Q. Was that a fair and reasonable market price for the birds at that time, sir? A. I believe so." [Tr. 168.]

"The Court: How long had you dealt with John Couch before [Tr. 147] August 1952?

The Witness: Off and on for, I think, four years.

The Court: Do you know of your own knowledge where he purchased his turkeys during that four years period of time?

The Witness: He operated throughout Southern California.

The Court: He bought them everywhere?

The Witness: Everywhere throughout Southern California, turkeys and poultry.

The Court: Do you know that of your own knowledge?

The Witness: I know that of my own knowledge, yes." [Tr. 173.]

"Q. (By Mr. Nimocks): You said you had been dealing with John Couch for some four years, is that correct? A. I believe four years, off and on for four years.

Q. Have there been any occasions where you had difficulty with turkeys he had sold you before? A. None whatsoever." [Tr. 175.]

"Q. (By Mr. Nimocks): Have you or your concern personally dealt with growers in regard to mortgaged turkeys? A. We have.

Q. As to Quaker Oats? A. We have.

Q. Was that before this time? (151) A. Before this time.

Q. Have you done it since this time? A. Since this time.

Q. Did anybody from Quaker Oats notify you, give you written consent to purchase those turkeys? A. We have never had written consent to buy any turkeys since I have been in business, never." [Tr. 176, 177.]

"The Witness: We will take John Couch as an example. He is the buyer of the commodity. So it has been the practice in the trade that whoever bought it should make the check payable jointly to the milling company and to the grower, and you usually would ask the grower, 'Are these turkeys chattel mortgaged?' If he refused to answer, you don't buy them, or you take time to check and see who holds the chattel. The buyer who buys the commodity at that time, the responsibility will usually lay in the hands of the buyer.

Our contacts with the grower would be similar. If we were to make first purchase of the turkeys, we would have responsibility of seeing that the feed company is paid.

The Court: What do you know about the right or the permisison given the grower to sell the turkeys?

The Witness: It has always been verbal. The field representative, such as this man that testified yesterday, would contact me as the processor, or Mr. Couch or any of the haulers (155) that buy livestock in the country, operate trucks in the country, tell them here is a particular flock of turkeys to sell, go to work on them. If you establish a satisfactory price or if that individual establishes a satisfactory price with the farmer, they would buy them and haul them to a person processing the commodity. Our business is primarily processing.

The Court: I know what your business is. The hauler goes up to a ranch to buy turkeys. What authority has the grower to sell those turkeys?

The Witness: Verbal from the field man.

The Court: Have you ever seen a written authorization?

The Witness: No, sir.

The Court: Have you ever received a written authorization?

The Witness: I have never received a written authorization, and I have bought lots of turkeys. The only instance of a written authorization was in this last year, a purchase where the commodity was not going to be paid for at the time we picked it up. You can verify this with General Mills. We were storing the commodity for the grower and they gave us directions on how the turkeys would be stored and in whose name they would be stored and retained. Other than that we have never received written authorization.

The Court: When you bought turkeys and paid for them, you never did get a written authorization from the company (156) furnishing the feed?

The Witness: No, sir, and I bought lots of Quaker Oats turkeys through another hauler.

The court: You bought Quaker Oats turkeys?

The witness: Yes, sir.

The Court: Did you receive any written authorization?

The Witness: No, sir.

The Court: Did you have any problem with any other hauler than Couch?

The Witness: I have never had any trouble with any hauler other than John Couch.

The Court: All right." [Tr. 179, 180, 181.]

Orville Robert Lewis testified in part as follows:

"Q. (By Mr. Maury): What is your occupation, Mr. Lewis? A. Retail poultry operator, store.

Q. Do you do business under the name of Thrifty Poultry Company? A. I. do.

Q. And where is that? A. It is 8907 Atlantic Blvd., in the City of South Gate.

Q. That is in Los Angeles County, California? A. Right.

Q. Calling your attention to the month of August, 1952, did you purchase any turkeys from John Couch or Charley Geers? A. I did." [Tr. 199.]

"The Court: Are those the only two transactions you had with Couch?

The Witness: During the month of August or September.

The Court: Had you dealt with Couch before?

The Witness: Yes.

The Court: How long?

The Witness: Three or four years." [Tr. 205.]

Testimony of Orville Robert Lewis:

The Court: How long have you been in the turkey business?

The Witness: 32 years (184).

The Court: Has your experience in the turkey business only been in the buying and dressing and processing of turkeys?

The Witness: Well, I have done everything in the turkey business from hauling them from Texas, I mean in 32 years I have gone the complete circle, I would think.

The Court: What questions do you ask the seller of turkeys as to whether or not they are mortgaged, there is a lien?

The witness: When we buy from a farmer a flock of any size—smaller flocks we know are not mortgaged, but the larger flocks, if we know the farmer, we ask him and take his word for the fact, whether they are mortgaged or not. If we don't know the farmer, we don't usually buy them.

The Court: The truckers, what do you do about the truckers?

The Witness: We buy the stuff without question.

The Court: Without any inquiry at all?

The Witness: That is the general procedure, unless we are suspicious of the man.

The Court: Are you familiar with the custom in Southern California relating to the sale of poults and sale of feed to the farmers?

The Witness: Right.

The Court: What is that custom? (185)

The Witness: I would say 90 per cent of the large flocks are owned by feed companies.

The Court: Are owned by the feed companies?

The Witness: I mean through the mortgage.

The Court: You mean through the mortgaging to the feed company? They are mortgaged to the feed company?

The Witness: Right.

The Court: Have you ever been given a written authorization to buy any turkeys from a feed company?

The Witness: It is a practice that does not exist. It is asked for, but never has been carried out.

The Court: Who has the authority to sell turkeys?

The Witness: Customarily the man that raises them is the one that sells them. I never bought anything from a feed company direct unless it was a foreclosure, of which I have had a lot. I mean they would foreclose on the mortgage.

The Court: When you go out to buy turkeys from a farmer, do you ask to see any written authorization to sell the turkeys?

The Witness: I never, and I bought lots.

The Court: You just buy them from the farmer.

The Witness: Just buy them from the farmer and make the check to the feed company and the farmer and go on.

The Court: That has been your experience?

The Witness: That has been the procedure for the last 30 (186) years.

The Court: All right.

Q. (By Mr. Maury): Do your checks bounce? A. Do my checks bounce?

Q. Yes, sir. A. I have a statement I can bring up here for $11,000 overdraft on my bank statement. I wouldn't think I would have much over that.

Q. The bank will meet your checks? They can give up to $15,000 on overdraft.

Q. Your credit is good? A. My credit is good. I have had checks bounce.

Q. But not for not sufficient funds. A. Yes, but years ago. 32 years is a long time.

Q. Let's say in the last five years." [Tr. pp. 206, 208.]

"Q. Do you know how many dollars worth of turkeys produced in the Southern California area annually? A. No, I could look at my files; but there are millions of dollars worth.

Q. Do you know of any custom or usage in the trade, the turkey industry, that checks are accepted as payment whether or not they are good checks? A. Well, it is customary when I give the farmers a check payable to the feed company and the farmer for him to in turn turn that over to the feed company as a payment on his bill, which naturally he is given the same form of credit on it as in a bank deposit. They wait until the check has cleared, I mean they don't take a check as currency anyhow whether it is in the feed business or anywhere else. I mean the check has to be good." [Tr. 209.]

Mr. Lewis after testifying to his experience as a Huckster having been in that business for 32 years, testified further as follows:

"The Court: Did you buy turkeys or did some of your employees buy turkeys from the farmers in 1952?" [Tr. 210.]

"The Witness: Yes, sir.

The Court: When you went up to a farmer to buy turkeys, who sold the turkeys?

The Witness: The farmer.

The Court: Did you ever see any written authorization that he could sell turkeys?

The Witness: I never even contacted a feed man.

The Court: You never contacted a feed man?

The Witness: I just bought the turkeys from the farmer and made the checks payable by the hundreds to the farmer and the feed man. I never contact the feed man.

The Court: Supposing the farmer doesn't tell you the turkeys are mortgaged to a feed company?

The Witness: Make out the check to the farmer, if you know the farmer.

The Court: If you know the farmer?

The Witness: Yes, I mean I would have no reason to (190) doubt the farmer I have known for six years. There is one man I buy from all the time and he buys from a feed company, I presume. He pays his bills.

The Court: Have you bought from any farmers financed by Quaker Oats Company.

The Witness: Yes.

The Court: And you bought from the farmer?

The Witness: Directly from the farmer.

The Court: Did the Quaker Oats Company ever tell you you couldn't buy direct from the farmer?

The Witness: No.

The Court: Did Quaker Oats Company ever tell you you had to have written authorization to buy?

The Witness: No. I bought Quaker Oats feed but I never had any other dealings with them. My checks will say 'Quaker Oats Company,' that's all. A check that is made for poultry is to some farmer and Quaker Oats Company, or some farmer and

Purina Feed Company, or some farmer and some other company.

The Court: I have no further questions." [Tr. 211, 212.]

We submit that the evidence is ample, without conflict and supports the statement in the trial courts opinion and findings of fact to the effect that title to the turkeys in question was transferred when delivery was made by the growers and the checks were made payable to the grower and the appellant and that the transactions were treated as cash all of which amounted to a waiver and extinguishment of the mortgage lien, and that the appellant by its own actions is estopped from denying transfer of the turkeys.

Mr. Harry McVickers, one of the growers, after testifying to his relationship with the huxters, testified in part as follows:

The Court: May I ask a question?

Mr. Maury: Certainly.

The Court: How long have you been raising turkeys?

The Witness: Seven years.

The Witness: Seven years.

The Court: Have you dealt with Quaker Oats before 1952?

The Witness: Yes, sir.

The Court: Quaker Oats has always had a mortgage on the turkeys, have they, for the turkeys and the feed?

The Witness: Yes, sir.

The Court: Every year, you have sold the turkeys as the poults would grow up and mature?

The Witness: Yes, sir.

The Court: Did you ever have any written authorization from Quaker Oats that you could sell turkeys?

The Witness: No, sir, I didn't.

The Court: You just sold them to the buyers as they came along?

The Witness: That's right.

The Court: Then you notified the Quaker Oats that they had been sold and sent the money to them?

The Witness: I did not notify them first. I sent the money first. (201)

The Court: You sent them the money?

The Witness: That's right.

The Court: As far as Geers is concerned, you just followed the custom that had been established for several years, you sold the turkeys, took the check, and sent it to Quaker Oats, is that right?

The Witness: That's right.

The Court: Just a minute. I notice Exhibit 13, which is a turkey growers agreement, supposed to have been signed by you, specifically says, 'Grower shall not sell, encumber, or otherwise dispose of said turkeys without the prior written consent of Quaker."

The Witness: Yes, sir. Well, it isn't strictly enforced that way. I don't know how to explain it.

The Court: But you never did get a written consent?

The Witness: No, sir, I did not.

The Court: And you sold your turkeys from year to year?

The Witness: That's right.

The Court: And Quaker never objected up to this particular time to your selling the turkeys?

The Witness: That's right." [Tr. 219, 220, 221.]

"Q. (By Mr. Geers): Did you have any discussion with Quaker Oats or any representative or agent of theirs regarding the sale of your turkeys to John Couch or myself? A. Yes. I sold the first load to you and then Brooks came along and said, 'Get your checks in to the Quaker Oats.' That's all that was said.

Q. Your checks were already in, though, weren't they? A. That's right.

The Court: After you sold the first load, Mr. Brooks came around to see you and he said, 'Get your checks in.' Did he mean the checks for the birds that were already sold or the (217) birds that were to be sold?

The Witness: The birds that were already sold. He says, 'Get your checks in.'" [Tr. 233.]

Mr. Carl W. Ohlson one of the growers testified in part as follows:

"The Court: May I ask this witness some questions? (226)

Mr. Maury: Surely.

The Court: How long have you been in the turkey business?

The Witness: About four years.

The Court: Have you always dealt with Quaker?

The Witness: I dealt with Quaker for the first two years and that was the second year of my dealings.

The Court: In 1952, that was your second year growing turkeys?

The Witness: Yes.

The Court: In 1951 had you grown turkeys?

The Witness: Yes.

The Court: Did you deal with Quaker?

The Witness: Yes, I did. I started with Quaker.

The Court: You said you had two other flocks?

The Witness: That's right.

The Court: Did you have those with Quaker, too?

The Witness: Yes. The whole year's operation was with Quaker Oats Company.

The Court: In 1951, how many flocks did you have?

The Witness: Two.

The Court: Who sold the flocks?

The Witness: I sold the birds.

The Court: Did you have any written authorization from Quaker that you could sell them? (227)

The Witness: I was in contact with their field man right along and their field man, who was Mr. Canan at that time, recommended Mr. Muzak, and I sold my birds to him and I had no trouble.

The Court: They didn't give you any written memorandum?

The Witness: No, they didn't give me any written memorandum.

The Court: In 1952, did you sell any birds in 1952 before you sold the birds in litigation here?

The Witness: I sold approximately 75 or 80 birds to small operator.

The Court: Did you have written consent from Quaker to sell those birds?

The Witness: No, I didn't.

The Court: Did you just sell them yourself and then you sent the money to Quaker?

The Witness: I sold them myself, and the check was made out to both of us, and I sent it to them.

The Court: Did you talk to the field representative before you sold those birds?

The Witness: Yes, I did." [Tr. 241, 242.]

"The Witness: No, he said Quaker Oats were preparing a list of approved buyers, but I never did receive that list of approved buyers. That was after I had already sold the birds. I waited for it. He said that wasn't on that list I should call the office and make sure the operator was trustworthy.

The Court: You didn't have any experience in raising turkeys except these two years, is that right?

The Witness: That's right." [Tr. 243.]

POINTS AND AUTHORITIES IN SUPPORT OF FINDINGS AND JUDGMENT.

Without restating the points and authorities cited by the trial court [Clk. Tr. 27, 28, 29, 30], appellees incorporate the same and respectfully contend that these authorities definitely uphold the conclusion reached by the trial court, which is simply to the effect that the plaintiffs permitted the growers to sell the mortgaged property and that thereupon the Quaker Oats Company lost its lien and that the removal of the turkeys and delivery to the appellees was not tortious, was accepted by appellees McKibben, Carter *et al.,* in the ordinary course of business and free from the mortgage lien.

The Law Applicable.

Appellees understand the law to be that the recordation of the chattel mortgage of one county of this state is "constructive" notice to the world.

See:

Hammels v. Sentous, 151 Cal. 231.

As before stated however, a factor is added in that the practice of plaintiff and other mortgagees in this field allowed mortgagors to dispose of the mortgaged chattels provided checks in payment thereof were made jointly to the mortgagee and mortgagor. It is true that mortgagor's written agreement with mortgagee provided that mortgagor must have prior written consent of mortgagee to sell; there is no evidence that that agreement was recorded so as to give constructive notice to prospective purchasers of that requirement nor is there any evidence at all to show that mortgagee required compliance with that provision. On the contrary, appellant

has made it a practice to either give oral assent or to allow the mortgagor to sell without any prior consent, either oral or written. The appellants contention herein would allow it to reap all the benefits of the practices they have indulged without taking any of the risks involved in allowing such a practice and not requiring strict compliance with their written contract.

It appears to be well settled that the general rule in the United States is embodied in 97 A. L. R. 646 which states as follows:

> "The rule is well established that the consent of a chattel mortgagee that his mortgagor sell the mortgaged property and receive the proceeds, when acted upon, constitutes as to the purchaser, a waiver of the lien of the mortgage."

California has followed that rule on numerous occasions, as early as 1896 and as recently as 1936.

See:

Maier v. Freeman, 112 Cal. 8 (Cited in Court's opinion);

McIntyre v. Hauser, 131 Cal. 11;

Ramsey v. Calif. Packing Corp., 51 Cal. App. 517 (cited in Court's opinion);

Valley Bank v. Hillside Packing Co., 91 Cal. App. 738 (Cited in Court's opinion);

Reno v. Boyden Co., 115 Cal. App. 697 (Cited in Court's opinion);

Kuehn v. Don Carlos, 5 Cal. App. 2d 25;

Chapman & Co. v. Ulery, 15 Cal. App. 2d 452 (Cited in Court's opinion);

In *Maier v. Freeman,* cited above, there was a mortgage of sheep; there was also an agreement in writing that mortgagor could sell the mortgaged chattels but would deposit sales money to mortgagee's account in the bank. The Court held that the lien upon the sheep is lost and extinguished by the sale.

In *Ramsey v. California Packing Corporation,* cited above, at page 529, the Court said that an agreement allowing mortgagors to sell mortgaged crops and turn over the proceeds of the sale to the mortgagee amounts, in practical effect, to a substitution of the personal obligation of the mortgagors for the security of the mortgage.

Applying the rules cited above to the instant case, it would appear that appellants indulgence in the practice of allowing mortgagor to sell said chattels constitutes as to these Appellees who were purchasers in good faith and for value, a waiver and extinguishment of the lien of the mortgage.

> "A chattel mortgagee may waive his mortgage lien or be *estopped to enforce it* by conduct inconsistent with its existence, *and consent to sell under said circumstances may constitute a waiver.*"
>
> *Kuehn v. Don Carlos,* 5 Cal. App. 2d 25, 41 P. 2d 585;
>
> McKinney, Cal. Digest, Mortgages, Sec. 62, p. 963.

Errors Specified by Appellant.

Appellant's under Specifications of Error, pages 3 to 7 inclusive of its opening brief cite nineteen separate specifications.

These specifications may all be epitomized and find their answer to the question of whether there has been extinguishment of the mortgage lien by reason of the acts of the appellant as borne out by the evidence upon which the affirmative answer to the question of the trial court is based.

Appellant, page 16 of its opening brief, criticizes the statement of the court, which is as follows:

> "It is true that, although the transaction involved herein were carried on by payment by check, all parties treated the same as cash transactions."

Although it would seem that this statement is *obiter dicta* to the courts conclusion, the testimony of the representative of appellant Mr. Brooks hereinbefore quoted fully answers this question wherein he stated in part as follows:

> "the requirements of our contract with the Growers call for checks to be made out jointly to the Grower and the Quaker Oats Company—" [Tr. 162.]

Answering Points Raised by Appellant.

Appellees have no argument to submit against the elemental rules of law regarding preparation and recording of chattel mortgages. Even though these appellees were in no way a party to the chattel mortgages, we understand the elemental rule to be that the mortgage itself follows the security for which it is given. This does not mean, however, that such lien for security may not be ex-

tinguished by acts of the mortgagee. This all-important point seems to have no understanding on the part of appellant and is charmingly disregarded by appellant by printing matters foreign to the trial court's findings and judgment. As an example, under Specifications of Error (App. Op. Br. p. 3), appellant contends that the trial court made inconsistent findings of fact and conclusions of law. Submitting this matter without argument, it is difficult to see wherein inconsistent findings and judgment (if in fact there is an inconsistency), has injured or damaged appellant. The reasoning of the trial court is fully set forth in the Memorandum of Opinion [Clk. Tr. 21] and the findings and judgment consistently follow the court's reasoning.

Appellant contends (Op. Br. p. 16) that bad checks are not payment and confine the greater part of its contentions to that point. We may of course concede that the elemental rule is that a bad check *tortiously given* may not constitute payment. However, that elemental rule is entirely outside the issue here, particularly for the reason that appellees McKibben, Carter and Lewis did not give bad checks, nor is there anything in the evidence which could possibly establish that it was necessary for appellant to receive money on the checks before title could pass.

On page 16 *et seq.* of appellant's brief under heading "Bad checks are not payment" appellant cites various elemental rules in support of its contention. We have no brief with the elemental rule but from an examination of authorities cited by appellant it is quite apparent that appellant fails to distinguish between an unlawful and tortious act and conduct constituting estoppel and acts done by and with the consent of the appellant in the ordinary course and conduct of business.

The case of *Clark v. Hamilton,* 209 Cal. 1, cited on page 17 of appellant's brief, involves the fraudulent giving of a worthless check in payment for a diamond. The fraudulent giving was, of course, a tortious act which element is lacking in the case at bar. Furthermore, in that case the plaintiff did not transfer possession of that ring without power to dispose of it. The evidence in the case at bar is that the plaintiff knew that the hucksters would sell the turkeys to a processor. Quoting from this case the court states:

> "There must have been *some act or conduct on the part of the real owner whereby the party selling was clothed with apparent ownership or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of the innocent third persons dealing on the faith of such appearances.*
>
> *Levi v. Booth,* 58 Md. 305 (42 Am. Rep. 332)."

Therefore, the *Clark* case is no authority for the case at bar and supports appellees contention that the growers of the turkeys were clothed with apparent ownership and authority to sell. The only restriction being placed upon the grower was that the checks would be made payable jointly to the grower and the Quaker Oats Co.

Appellant cites the case of *South San Francisco Packing & Provision Co. v. Jacobson,* 183 Cal. 131, page 18 of opening brief.

This was an action in inter pleader. The money was deposited in court and the ownership to be determined between the packing company the owner, and an attaching creditor. The issue of estoppel or transactions made in the ordinary course of business were not in issue. Again Jacobson, the agent, issued a spurious check and disap-

peared. There was evidence of fraud. The court held that the appellants were entitled to the funds as against the attaching creditor, the Western Meat Co. This on the theory there was a tortious act not in the ordinary course of business, and that estoppel did not apply. The court does, however, state the rule to be as follows:

> "The title will not pass until payment if by the terms of the contract such payment is a condition precedent, *or if it otherwise appears that such was the intention of the parties, unless the condition as to payment is waived.*" (35 Cyc. 322.)

It must be borne in mind that the innocent Purchaser was not made to suffer by the court's decision.

The case of *Towey v. Esser* cited in appellant's opening brief, page 35, also involves an action in interpleader. It does not involve the matter of doing business in its ordinary course, nor does it involve the matter of waiver or extingushment of a mortgage lien. In that case, the authority to sell the live stock was to *sell only for cash.* It does not involve the agreement between the mortgagor and the mortgagee that sales may be made upon payment of checks made jointly to the mortgagor and mortgagee. The true rule is set forth in the *Towey* case as follows:

> *"True,* as pointed out by the court therein where the seller expressly agrees to accept a check or bill or note as absolute payment, *title to the goods will pass upon delivery of the goods and the acceptance of such check or bill or note regardless of whether the paper is honored on due presentation thereof."* (133 Cal. App. 673.)

In the case at bar the evidence is uncontradicted that the growers had the right to make a sale of the turkeys. Therefore, the general rule of the transfer of title does

not apply, particularly in view of the further fact that the sale or sales to appellees were made in the usual course of business by and with the implied consent of appellant. Therefore, the *Jacobson* case is not applicable.

Appellant cites the case of *Mitchell v. Porter,* 123 Cal. App. 329. (App. Op. Br. p. 19.) Again we have the commission of a tortious act in acquiring possession of the property, which element is entirely lacking in the case at bar.

On page 20 of the opening brief, appellant cites authorities from 70 Corpus Juris Secundum, and quotes:

> "The delivery to, or acceptance by, the creditor of the debtor's check, as distinguished from the actual payment of the check, is not absolute payment of the obligation for which the check is given *in the absence of any agreement or consent* to receive it as payment, or any laches or lack of diligence on the part of the creditor, or negotiation by the check by him.
>
> "The delivery to, or acceptance by, the creditor of his debtor's check, although for convenience often treated as the passage of money, is not payment, even though the check is certified before delivery, *in the absence of any agreement or consent to receive it as payment,* or any laches or want of diligence on the part of the creditor, or the negotiation of the check by him, as discussed *infra* subdivisions b-d of this section. In such case, the original debt is not paid or discharged unless, and until, the check itself is actually paid on due presentment, or, it is sometimes stated, until it is honored or accepted by the drawee; and, where the check is not paid on presentment, the creditor may treat it as a nullity, return it, and recover on the original debt, or, at his option, sue on the check."

We have no argument with the general rule but in the case at bar *there was an agreement* amounting to consent by the appellant that checks could be received in payment for the purchase price of the turkeys. Furthermore, the case cited does not go into the matter of the ordinary course of doing business nor does it raise the matter of estoppel.

Other authorities cited by appellant have been examined and we feel it would be repetitious to cite each case in detail as they all go to the fundamental rule which is to the effect that in order to constitute conversion, there must be some tortious and unlawful act which appellant fails to distinguish between the established rule and the authorities cited and applicable to the case at bar.

If appellant's contention herein is followed, it would mean that a penalty would be placed on the right to transact business in its ordinary course. It would also completely reverse the decisions cited herein to the effect that where the mortgagee gives his consent to the mortgagor to sell the property and turn over the proceeds to the mortgagee, these facts constitute an estoppel and a waiver of the mortgaged lien.

Appellant further contends that the doctrine of *caveat emptor* applies. The elemental definition of *caveat emptor,* as we all know, is "Let the buyer beware."

It must be borne in mind that the appellees Downey Co. and Lewis took possession of the turkeys in question and paid for them in the ordinary course of business. They had no way of knowing, nor were they chargeable

with knowledge, that checks had been given by the hucksters against a bank account that did not contain sufficient funds to meet these checks. Such a contention on the part of appellant finds no support in the evidence and we submit the question without further argument.

If this contention could possibly be supported in law, then it would be the duty of every housewife when making a purchase at the grocery store, to determine whether the grocer had paid the wholesale merchant for the merchandise; and, further, whether the wholesaler had paid the jobber and manufacturer for the same, assuming that the manufacturer had a duly recorded chattel mortgage upon the merchandise. Further, if such contention is correct, if a man buys a suit of clothing from a retail merchant, upon which a manufacturer has a duly recorded chattel mortgage, it would be the duty of the purchaser to determine whether the chattel mortgagee had been paid or the lien extinguished. Obviously this is not the law. Such contention falls by its own weight.

Extending the proposal of the application of the doctrine of *caveat emptor* to the *absurdus,* it would be unsafe for a housewife to purchase a bucket of oranges or prunes at her doorstep from a Huckster without inquiring or checking official records of Orange and Santa Clara Counties for the possibility of a chattel mortgage without being subjected to an action for damages for conversion.

We submit that the doctrine of *caveat emptor* finds no solace here.

Conclusion.

We contend, and respectfully submit, that the law of this case is clearly set forth and supported in the trial court's Memorandum of Opinion to the effect that in this case there was no unlawful or tortious conversion of the turkeys; that the turkeys were purchased by the appellees McKibben, Carter and Lewis in the ordinary course of business and trade, and that the mortgage lien has been extinguished and appellant is estopped from asserting the same; that whatever rights the Quaker Oats Company may have against the makers of the checks issued against a bank account having insufficient funds or others is entirely foreign and not germane to the issues involved, insofar as these appellees are concerned.

Respectfully submitted,

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